Petition

81-1190

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ZAN-CAR ENTERPRISES, INC.
and CHARLES A. ZANDER,

PETITIONERS,

v.

HOME STATE SAVINGS ASSOCIATION
and WARNER NATIONAL CORPORATION,

RESPONDENTS.

ON
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR
THE SIXTH CIRCUIT

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QUESTION PRESENTED

Was the dismissal for want of prosecution, for failure to answer interrogatories and produce documents an abuse of discretion and contrary to the decisions of other Courts of Appeals and this Court, when:

1. No motion to compel the discovery was filed by Respondent, prior to filing the motion to dismiss for want of prosecution.

2. No order to compel discovery was ever entered against Petitioners by the District Court.

3. No warning was ever given to Petitioners by the District Court.

4. 3-1/2 months remained for discovery, when the answers to interrogatories were filed and the documents produced.

5. No firm trial date had yet been set by the District Court.

6. The cause had been at issue for seven months, during which time the Respondents wrote two or three letters and made two or three telephone calls, demanding the discovery during a 30 day period, but waited four months thereafter, taking no further action, except to file the motion for dismissal for want of prosecution.

7. The Court of Appeals for the Sixth Circuit did not weigh any of the factors which all other Courts of Appeals have considered in determining whether a dismissal for want of prosecution is an abuse of discretion, including:

a. The policy that cases should be determined on their merits.

b. The ultimate sanction of dismissal should not be levied, unless the parties, not the attorneys, are responsible for the delay.

c. Whether there was any prejudice to the Respondents.

d. Whether there was any delay in the trial of the proceedings.

e. Whether the District Court failed to apply sanction less severe than dismissal?

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II.

A. Title 28, Rule 41(b) of Federal Rules of Civil Procedure

B. Title 28, Rule 60(b) of Federal Rules of Civil Procedure

DECISIONS BELOW

The United States Court of Appeals for the Sixth Circuit denied the Petition for Rehearing and Rehearing En Banc on September 23, 1981. The decision is unreported. A copy of the order is found at Appendix 1, Page A-1.[1] The order affirming the judgment of the District Court by the Court of Appeals was entered on June 29, 1981 and is presently unreported. A copy of that order is found at Appendix II, Page A-2. The decisions of the District Court for the Southern District of Ohio, dismissing the cause with prejudice and denying the motion to vacate the order of dismissal are

[1] "A-" refers to the Appendix to this Petition.

are found at Appendix IV and Appendix III, Pages A-11 and A-7. These decisions are unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing and Rehearing En Banc was entered on September 23, 1981. The time of day at which it was entered could not be ascertained from the record. This Petition for Certiorari will be timely if filed by mail on or before December 22, 1981 without an extension. The Petitioners invoke this Courts jurisdiction under 28 U.S.C. Section 1254 (1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 41(b) of the Federal Rules of Civil Procedure states in pertinent part:

> "... for failure for Plaintiff to prosecute or comply with these rules or any order of court, Defendant may move for dismissal of an action or any claim against him ..."

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "...on motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> 1. Mistake, inadvertence, surprise or excusable neglect ..."

STATEMENT OF THE CASE

On February 16, 1979, the Petitioners filed a three-count complaint against the Respondents. Federal jurisdiction was based on the diversity of the citizenship of the parties. The complaint alleged that a certain financial commitment, issued by Respondent Home State Savings Association to Petitioner Zan-Car Enterprises, Inc. was valueless and useless, asking that it be rescinded, that the fee paid for it be returned, that interest, attorneys fees, and punitive damages be awarded (A.2-7).[2] On March 5, 1979, the Respondents filed an answer denying these allegations, raising certain affirmative defenses, and asserting a counterclaim for

[2] "A" refers to the Appendix filed in the Sixth Circuit Court of Appeals

$64,000.00. On the same day, counsel for Respondents served the first set of interrogatories on counsel for Petitioners and on March 20, 1979, counsel for Respondents served the first request for the production of documents (A.14-44). On March 26, 1979, the Petitioners filed a reply to the defenses and an answer to the counterclaim (A.45-47).

During the months of April and May, 1979, counsel for the Respondents sent letters and made telephone calls to counsel for Petitioners, asking for the answers and the production of documents, which were overdue. Counsel for Petitioners requested additional time, explaining that one of the Petitioners, Charles A. Zander, was in ill health and had been hospitalized (A.85-92). The

last communication was a letter written by counsel for Respondents on May 31 and there was no further communication between counsel for Respondents and counsel for Petitioners regarding this matter until the motion to dismiss was filed on September 28, 1979. On June 4, 1979, the District Court filed a preliminary pretrial order, ordering that all motions directed to pleadings be filed by June 15, 1979, ordering that all discovery be completed by March 1, 1980, and ordering that trial of the cause was tentatively scheduled for the second quarter of 1980 (A.93).

On September 28, 1979, counsel for Respondents filed a motion to dismiss this cause for failure to prosecute, citing as the primary reason for the motion, the failure of the Petitioners to respond to the discovery requests of

the Respondents (A.48-94). On October 29, 1979, the District Court issued an order, noting that the Petitioners had not responded to the motion within the time provided by the local rule and directing Petitioners to show cause within 10 days why the motion to dismiss of Respondents should not be granted. (A.95). On November 9, 1979, Petitioners moved for an additional four days to respond to the motion of Respondents to dismiss, explaining the reasons for such motion and the reasons why they had not filed a response to the motion to dismiss prior to that time (A.96-99).

The District Court orally agreed to that extension, even though no formal order had been entered, and the Respondents filed no objection (A.224). On November 13, 1979, the District Court Clerk received a motion, memorandum, affidavit

and order. The motion portion was entitled as follows:

> "MOTION OF PLAINTIFFS FOR LEAVE TO FILE ANSWERS TO INTERROGATORIES AND PROOF OF PRODUCTION OF DOCUMENTS BY NOVEMBER 15, 1979"(A.100)

The memorandum portion was entitled as follows:

> "MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFFS FOR LEAVE TO FILE ANSWERS TO INTERROGATORIES AND PRODUCE DOCUMENTS AND IN OPPOSITION TO MOTION OF THE DEFENDANTS TO DISMISS" (A.100)

Those documents were not filed by the Clerk. Rather, they were returned with the following letter dated November 13, 1979, from the Clerk:

> "Please note that the pleadings entitled Motion of Plaintiffs for leave to file answers to Interrogatories and Proof of Production of Documents by November 15, 1979 are being returned to you.
>
> Your Local Counsel Mr. Richard Glazer will explain our Local Rule forbidding Discovery motions to be filed with the Court." (A.164).

On November 14, 1979, counsel for Petitioners served the answers to interrogatories and the documents requested in the notice to produce on counsel for the Respondents by mail (A.114-145). On November 16, 1979, he received the letter of November 13, from the Court Clerk returning the motion, memorandum, affidavit, and order. He returned them on that same day asking the Clerk to disregard the motion portion of the document and to simply file them as a response. Counsel for Petitioners explained that the response was due by November 13 and asked the Court Clerk to inform the District Judge of the circumstances. In addition, counsel for Petitioners telephoned the Law Clerk to the District Judge on November 16, 1979, explaining what had occurred (A.150-153, 197).

On November 23, 1979, counsel for Petitioners received the order of the District Court dismissing the cause, along with all of the documents that were originally received by the Clerk's Office on November 13, 1979 (A.162). On November 26, 1979, counsel for the Petitioners filed a motion to vacate the order of November 21, 1979, pointing out all of the above circumstances, including the fact that the motion, memorandum, affidavit, and order had been received by the Clerk on November 13, 1979, and returned (A.149-199). Counsel for Respondents filed a memorandum in opposition to the motion to vacate and counsel for the Petitioners filed a memorandum in reply (A.200-222). On January 9, 1980, the Court below denied the motion of Petitioners to vacate and entered a judgment thereon (A.223-225).

On February 8, 1980, Petitioners filed a notice of appeal from the order and judgment of November 21, 1979 and the order and judgment of January 9, 1980 to the United States Court of Appeals for the Sixth Circuit (A.226).

The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court as follows:

> "Rule 60(b)(1) states that on motion a court may relieve a party from a final judgment or order for 'mistake, inadvertence, surprise, or excusable neglect.' Whether or not the district court erred in concluding that the memorandum contained in the motion of November 13th was not a responsive pleading, the "controlling factor" in the dismissal was plaintiff's failure to prosecute the action. Plaintiffs were dilatory in responding to discovery and failed initially to respond to the show cause order. Because the record reveals a pattern of delay by plaintiffs in this lawsuit, we conclude that the district court did not abuse its discretion when it dismissed the action for failure to prosecute.

Accordingly, the judgment of the district court is hereby affirmed." (A-5-A-6).

The Court of Appeals denied the Petition for Rehearing and Rehearing En Banc on September 23, 1981.

ARGUMENT

THE DISMISSAL FOR WANT OF PROSECUTION WAS AN ABUSE OF DISCRETION CONTRARY TO THE DECISIONS OF THE COURTS OF APPEALS AND THIS COURT

The decision of the District Court and the Court of Appeals for the Sixth Circuit upholding the dismissal for want of prosecution, is contrary to all of the decisions in all of the other circuits, including a recent decision in the Court of Appeals for the Sixth Circuit, and is contrary to a decision of this Court. The factors governing the question of whether a dismissal for want of prosecution is proper are set forth in Reizakis vs. Loy, 490 F.2d 1132 (CA4, 1974), at 1135, as follows:

"A district court unquestionably has authority to grant a motion to dismiss for want of prosecution. Fed. R.Civ.P. 41(b). Indeed, as the Supreme Court held in Link v. Wabash R.R., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the trial court can take such action on its own motion. But courts interpreting the rule uniformly hold that it cannot be automatically or mechanically applied. Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits. See generally, Wright & Miller, Federal Practice and Procedure: Civil § 2369, 2370 (1971).Consequently, dismissal 'must be tempered by a careful exercise of judicial discretion.' Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1967). While the propriety of dismissal ultimately turns on the facts of each case, criteria for judging whether the discretion of the trial court has been soundly exercised have been stated frequently: Rightfully, courts are reluctant to punish a client for the behavior of his lawyer. Edsall v. Penn Central Transportation Co., 479 F.2d 33, 35 (6th Cir. 1973). Therefore, in situations where a party is not responsible for the fault of his attorney, dismissal may be invoked only in extreme circumstances. Industrial Building Materials, Inc. v. Interchemical

> Corp., 437 F.2d 1336, 1339 (9th Cir. 1970). Indeed, it has been observed that '(t)he decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff.' Durham v. Florida East Coast Ry. Co. 385 F.2d 366, 368 (5th Cir. 1967). Appellate courts frequently have found abuse of discretion when trial courts failed to apply sanctions less severe than dismissal. See e.g., Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971); Flaksa v. Little River Marine Construction Co., 389 F.2d 885, 887 (5th Cir. 1968); Dyotherm Corp. v. Turbo Machine Co., 392 F.2d 146, 148 (3d Cir. 1968). And generally lack of prejudice to the defendant, though not a bar to dismissal, is a factor that must be considered in determining whether the trial court exercised sound discretion. Pearson v. Dennison, 353 F.2d 24, 28 (9th Cir. 1965).'"

This position is supported by the great majority of the decisions in the other Circuits, including the Sixth. Richman v. General Motors Corp., 437 F.2d 96 (CA1, 1971); Schenek v. Bear Stearns & Co., Inc., 583 F.2d 58 (CA2,

1978); Dyotherm Corp. v Turbo Machine Co., 392 F.2d 146 (CA3, 1968); Silas v. Sears, Roebuck & Co., Inc., 586 F.2d 380 (CA5, 1978), Carter v. City of Memphis, Tennessee, 636 F.2d 159 (CA6, 1980); J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (CA7, 1976); Moore v. St. Louis Musical Supply Co., 539 F.2d 1191 (CA8, 1976); Industrial Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (CA9, 1970).

If these factors are applied to the case at bar, it is clear that the motion to dismiss should have been denied and the motion to vacate granted. The degree of personal responsibility on the part of the Petitioner for the delay was small and excusable. The delay on their part was attributable to the fail-

ing health and hospitalization of Petitioner Charles Zander. The balance of the delay was due to involvement of counsel of the Petitioners (A.159-161). The record reveals no contumacious conduct on the part of the Petitioners themselves.

The record reveals no prejudice to the Respondents in the delay in responding to the discovery requests. After the service of the answers to the interrogatories and the documents, Respondents had approximately 3-1/2 months for additional discovery and an additional month thereafter to prepare for trial, the trial date having been tentatively set for some time after April 1, 1980 (A.93, 116, 139). In addition, the Respondents took no action to compel the answers or pro-

duction of documents for four months prior to September 28, 1979, when the motion to dismiss was filed (A.1, 92).

With regard to the question of delay, the record reveals that the delay in responding to the discovery requests would not have delayed the trial of this case. The District Court, on June 4, 1979, entered an order, calling for completion of discovery by March 1, 1980, and tentatively scheduling the trial for the second quarter of 1980 (A.93). The responses to discovery were served on opposing counsel on November 14, 1979 (A.116, 139), 3-1/2 months before the discovery completion date and 4-1/2 months before the tentative period for trial. Nothing in the record shows why the delay in responding to the discovery would have

altered the timetable set by the District Court. Again, it should be noted that the Respondents acquiesced for four months in the delay by taking no action to compel a response to the discovery.

Finally, the record reveals no attempt to apply less severe sanctions. In fact, the Respondents made no motions to compel a discovery or for other sanctions prior to filing the motion to dismiss (A.1). The District Court below issued no orders seeking compliance with the discovery requests and did not consider lesser sanctions.

In neither of its orders, (A.147-148, 224-225), did the District Court below consider any of the factors set forth above, in arriving at its determination on the motion to dismiss or the motion to vacate. The opinion of

the Court of Appeals no consideration of these factors (A-2 - A-6).

In the case of Nat. Hockey League v. Metro Hockey Club, 427 U.S. 639, 49 L.Ed 2d 747, 96 S.Ct. 2778, this court upheld an order dismissing a cause for want of prosecution under the following circumstances:

> "The District Court, in its memorandum opinion directing that respondents' complaint be dismissed, summarized the factual history of the discovery proceeding in these words:
>
> > 'After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith

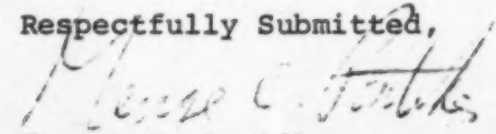
> when after being expressly directed to perform an act by a date certain, viz., June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions.
> (427 US 641)
> Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed R. Civ. P.37.'" 49 L.Ed. 2d at 750.

In the present cause, there were no motions for compliance, no discovery order by the Court, requiring compliance no extensions of those orders and no warnings by the Court. There were simply two or three letters and two or three telephone calls over a 30 day period, four months of no action and the filing of the motion to dismiss. The motion was granted when there were approximately 3-1/2 months left for discovery and no firm trial date set. While

the Plaintiffs in the National Hockey League case delayed for 17 months and disregarded repeated orders of the District Court, the Petitioners disregarded no discovery orders of the Court and delayed for a period of less than five months.

For the foregoing reasons, Petitioners ask this Court to grant Certiorari and review the judgment of Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



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APPENDIX I

COPY OF ORDER DENYING PETITION FOR REHEARING ENTERED SEPTEMBER 23, 1981

(Caption Omitted)

No. 80-3165

Before: WEICK and MERRITT, Circuit Judges; CECIL, Senior Circuit Judge

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

APPENDIX II

COPY OF ORDER AFFIRMING THE JUDGMENT OF THE DISTRICT COURT

(Caption Omitted)

No. 80-3165

Before: WEICK and MERRITT, Circuit Judges; CECIL, Senior Circuit Judge.

Plaintiffs appeal from a judgment denying their motion to vacate an order and final judgment under Fed. R. Civ. Proc. 60(b)(1).

Plaintiffs filed suit in February 1979 alleging breach of contract and misrepresentation by defendants in the issuance of "standby financing commitments." In March 1979 defendants served on plaintiff, simultaneous with the answer, a set of interrogatories, and two weeks later requested production of certain documents. Plaintiffs' attorney does

not dispute that in April and May 1979, counsel for defendants made repeated requests for the answers and documents. No answers or documents were produced and on September 28, 1979 defendants moved to dismiss for failure to prosecute. Plaintiffs made no response and on October 29, 1979 the district court directed plaintiffs to show cause within 10 days why the motion to dismiss should not be granted. On November 9, 1979 plaintiffs moved for additional time to respond, which was orally extended by the court until November 13th. On November 13th plaintiffs filed a motion to respond to discovery by November 15, 1979 and included with this request for additional time a "Memorandum in Support

of Motion of the Plaintiffs for Leave to File ...[Answers and Documents] and in Opposition to Motion of the Defendants to Dismiss." The documents were not filed by the Clerk because they failed to comply with the local rules. On November 21, 1979 the district court dismissed the case with prejudice, noting that "no responsive pleading" had been filed as of November 15, 1979 despite the show cause order. He noted that plaintiffs "have not prosecuted this matter or complied with the order of this court." (A 147-148). Five days later plaintiffs filed a motion to vacate pursuant to Rules 59(e) and 60(b)(1) because the court "decided the motion under the mistaken impression that no response had been filed ...." (A.150). On January 9, 1980 the district court

denied the motion:

> Setting aside for a moment the question of whether or not a filing not in compliance with local rules was in accordance with the Court's order, an examination of such proposed filing ... indicates that plaintiff simply sought additional time and did not file a responsive pleading.

The district court, however, found the "controlling" factor for dismissal to be plaintiff's failure to faithfully prosecute the action.

Rule 60(b)(1) states that on motion a court may relieve a party from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect." Whether or not the district court erred in concluding that the memorandum contained in the motion of November 13th was not a responsive pleading, the "control-

ling factor" in the dismissal was plaintiff's failure to prosecute the action. Plaintiffs were dilatory in responding to discovery and failed initially to respond to the show cause order. Because the record reveals a pattern of delay by plaintiffs in this lawsuit, we conclude that the district court did not abuse its discretion when it dismissed the action for failure to prosecute.

Accordingly, the judgment of the district court is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

APPENDIX III

ORDER OF DISTRICT COURT DENYING MOTION TO VACATE DATED JANUARY 9, 1980

(Caption Omitted)

No. C-1-79-105

ORDER

This matter is before the Court on plaintiff's motion to vacate its order of November 21, 1979, dismissing this cause with prejudice for failure to abide by the Court's order.

The factual background of the Court's order of November 21, 1979, is as follows: On September 28, 1979 defendants filed a motion to dismiss (Document 7) asserting a failure by plaintiff to comply with defendants' discovery requests. A response to this motion was due from plaintiff by October 18, 1979. No response was

ever filed. On October 29, 1979, this Court ordered the plaintiff to show cause within ten (10) days why the motion should not be granted (Document 8). The ten days in question ended November 8, 1979. On November 9, 1979 the plaintiff filed a motion for extension to November 13, 1979 (Document 9). Plaintiff was advised orally that if a responsive pleading were filed by the close of business on November 13, 1979, it would be accepted.

Plaintiff contends that a pleading was filed on November 13, 1979 with the Clerk of this Court but was returned for failure to abide by local rules. Setting aside for a moment the question of whether or not

a filing not in compliance with local rules was in accordance with the Court's order, an examination of such proposed filing (attached to Document 12, Motion to Vacate) indicates that plaintiff simply sought additional time and did not file a responsive pleading.

Plaintiff's conduct may be summarized as follows: He failed to respond to the motion to dismiss; he failed to show cause; and he failed to file a responsive pleading by the end of the final extension granted by the Court.

Upon reexamination of all pleadings filed herein, the Court believes its statements in the order of November 21, 1979 (Document 10) to be controlling: "A plaintiff undertakes an

obligation to opposing counsel and to the United States District Court that he will faithfully prosecute any action that he brings. Plaintiff in this case has failed significantly so to do ..."

The motion to vacate the order of November 21, 1979 is hereby DENIED.

It is so ORDERED.

Carl B. Rubin, Chief Judge
United States District Court

APPENDIX IV

ORDER OF DISTRICT COURT DISMISSING CAUSE WITH PREJUDICE DATED NOVEMBER 21, 1979

(Caption Omitted)

No. C-1-79-105

ORDER

This matter is before the Court under the following circumstances: On September 28, 1979 defendants moved to dismiss plaintiffs' complaint for failure to prosecute the action. The memorandum attached to such motion detained a long and consistent pattern of failure to respond to defense requests or to produce documents as required. Plaintiffs have never responded to defendants' motion despite an order of this Court on October 29, 1979 requiring such plaintiffs to show cause within ten (10) days why such motion should not be granted. On November 9, 1979 plain-

tiffs requested additional time to respond to November 13, 1979. As of the close of business November 15, 1979, no responsive pleading had been filed in this district.

It is clear from an examination of defendants' memorandum that plaintiffs have not prosecuted this matter or complied with the order of this court.

A plaintiff undertakes an obligation to opposing counsel and to the United States District Court that he will faithfully prosecute any action that he brings. Plaintiffs in this case have failed significantly so to do and therefore pursuant to Rule 41 (b), Federal Rules of Civil Procedure, this matter is hereby DISMISSED with prejudice.

It is so ORDERED

Carl B. Rubin, Chief Judge
United States District Court

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

PROOF OF SERVICE

George C. Pontikes, having first been placed upon his oath deposes and says:

1. He is the attorney for Petitioners for the above cause.

2. He caused 40 copies of the Petition for Writ of Certiorari to be mailed at the main United States Post Office in the City of Chicago, Canal and Van Buren on December 22, 1981.

George C. Pontikes

Subscribed and sworn
to before me this 22nd
day of December, 1981.

Notary Public

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

PROOF OF SERVICE

The undersigned, having been duly put upon oath, deposes and says that the attached three copies of the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit was served upon:

Mr. Charles J. Faruki
P.O. Box 1817
Dayton, Ohio 45401

by placing the same in an envelope bearing sufficient postage, addressed to the above-named party, and by placing the same in the United States Mail located at 30 N. LASALLE on December 22, 1981.

Richard J. Bajorski

Subscribed and
Sworn to before
me this 22nd day
of December, 1981.

Notary Public

Opposition

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CLERK

No. 81-1190

IN THE

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OCTOBER TERM, 1981

ZAN-CAR ENTERPRISES, INC.
AND CHARLES A. ZANDER,

Petitioners,

v.

HOME STATE SAVINGS ASSOCIATION
AND WARNER NATIONAL CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether, under the abuse of discretion standard of review, the United States Court of Appeals for the Sixth Circuit erroneously affirmed the District Court's dismissal for failure to prosecute the action, when the District Court found "a long and consistent pattern of failure to respond to defense requests or to produce documents as required," A-11,[1] and the Sixth Circuit's review of the papers filed in the District Court led it to conclude that "the record reveals a pattern of delay by Plaintiffs in this lawsuit," A-6, and when Petitioners repeatedly failed in the District Court to respond:

(1) To numerous and repeated discovery requests;

(2) To the Motion of Defendant Home State Savings Association to Dismiss Plaintiffs' Complaint, filed September 28, 1979 (which sought dismissal for failure to prosecute under Fed. R. Civ. Pro. 41 (b), and to which a response was due within twenty days under S.D. Ohio Rule 3.5.2); and,

(3) To the District Court's Order filed October 29, 1979 (giving Plaintiffs ten days to show cause why the motion to dismiss should not be granted).

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[1] References are to the Court opinions attached as Appendices at the end of the Petition for a Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1190

ZAN-CAR ENTERPRISES, INC.
AND CHARLES A. ZANDER,

Petitioners,

v.

HOME STATE SAVINGS ASSOCIATION
AND WARNER NATIONAL CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Although the texts of the decisions below are unreported, the Order of the Sixth Circuit appears in a table in the Federal Second Reporter. The citation is *Zan-Car Enterprises, Inc.* v. *Home State Savings Association,* 661 F.2d 935 (6th Cir. 1981) (Table).

STATEMENT OF THE CASE

A statement of the case by Respondents is necessary because the statement of the case appearing at pp. 11-19 of the Petition For Writ of Certiorari misleadingly describes the pleadings filed, the sequence of events, and the actions of the District Court; the Petitioners' statement of the case also totally ignores the following relevant facts showing a consistent pattern of delay.

While this action was pending in the District Court in Cincinnati, Petitioners missed the following response dates, and refused or failed to provide the following discovery:

(1) Responses due on or before April 9, 1979, to First Set of Interrogatories of Defendants to Plaintiffs, served March 5, 1979.

(2) Production of documents on or before April 23, 1979, in response to Defendants' First Request for Production and Inspection of Documents, served March 20, 1979.

(3) Extension of time until April 23, 1979, for Petitioners to provide the answers to First Set of Interrogatories of Defendants to Plaintiffs. (This extension of time was agreed to in a telephone conversation and confirmed in a letter of counsel of April 25, 1979 that is Exhibit D to the Motion of Defendant Home State Savings Association to Dismiss Plaintiffs' Complaint, filed September 28, 1979).

(4) Additional extension of time for both documents and interrogatory answers requested by counsel for Petitioners in his letter of April 23, 1979 (Exhibit E to Motion to Dismiss), and agreed to be counsel for Respondents in letter of April 26, 1979 (Exhibit F to Motion to Dismiss).

(5) May 22, 1979, additional extension of time offered unilaterally by counsel for Respondents in letter of May 10, 1979 that was Exhibit G to Motion to Dismiss, but which was never accepted or used by Petitioners.

(6) Response due within twenty days to Motion of Defendant Home State Savings Association to Dismiss Plaintiffs' Complaint, filed September 28, 1979.

(7) Response due November 8, 1979, to Order filed October 29, 1979, (Exhibit A to this brief) in which the District Court directed Petitioners to show cause why the Motion to Dismiss should not be granted.

(8) November 13, 1979, date requested by Petitioners within which to file a response to the Motion to Dismiss. This November 13 date was requested in the Petitioners' Motion for Additional Time to Respond to Motion of the Defendant to Dismiss, filed November 9, 1979.[2]

The description of this case presented by Petitioners at

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[2] Petitioners are chronically late. In addition to the pattern of delay recounted in this brief, Petitioners missed the time for filing their brief and their appendix in the Sixth Circuit. Moreover, their Petition for Writ of Certiorari was filed at the very last possible minute, on the 90th day after entry of the Sixth Circuit Order (A-1) denying rehearing; the Petition for Certiorari would only be timely under Supreme Court Rule 28.2, because it was deposited with the United States Post Office in Chicago on December 22, 1981. Counsel for Petitioner even sent to counsel for Respondent this Court's notice that he was enclosing appearance forms to be filed with the clerk of this Court. However, counsel for Petitioner sent only that notice and not the appearance forms. Counsel for Respondent had to obtain the appearance forms from the clerk of this Court. This is yet another example of Petitioner's chronic inability to comply with court rules.

pp. 1-2 and 11-17 of the Petition for Writ of Certiorari is so far removed from the facts as to read like a description of another case. Petitioners totally ignore the extensive efforts by counsel for Respondents to obtain responses from Petitioners to the discovery requests. Attached as Exhibit B to this brief is the affidavit of counsel for Respondents and a series of correspondence exchanged between counsel when the case was in the District Court.[3]

Incredibly, Petitioners tell this Court at p. 1 of the Petition for Writ of Certiorari: "No warning was ever given to Petitioners by the District Court." That statement is false. In its Order filed October 29, 1979 (attached as Exhibit A to this brief), the District Court noted that Petitioners failed to respond to the Motion to Dismiss, and quoted the language from S.D. Ohio Rule 3.5.2 that failure to file an opposing memorandum "may be cause for the Court to grant the motion as filed." Even though, by the express terms of this local Rule, the District Court could have granted the September 28, 1979 Motion to Dismiss, the District Court gave Petitioners another chance: the District Court gave Petitioners ten days within which to show cause "why the Motion to Dismiss of Home State Savings Association should not be granted as filed." Petitioners did not file any papers (much less show cause) within the ten days given by that Order.

On November 9, 1979, Petitioners filed a motion for

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[3] These documents were exhibits C through I to the Motion to Dismiss, were part of the Appendix in this case in the Sixth Circuit (found in the Sixth Circuit Appendix as A. 81-92), and are the documents referred to by the District Court in its Order of dismissal. [A-12]). These documents detail the repeated promises of production of documents and interrogatory answers that were never fulfilled, the repeated attempts by counsel for Respondents to obtain discovery responses, and the pattern of delay found by the Sixth Circuit (A-6).

additional time to respond to Respondents' Motion to Dismiss. Petitioners still did not file a response to the document request or any answers to interrogatories. That motion for additional time to respond contained no authorities. It merely listed other cases on which counsel for Petitioners had been working. That motion sought leave "until November 13, 1979 to respond to the Motion of the Defendant to Dismiss to the show cause order entered by the Court. . . ." Apparently this language meant that leave was sought until November 13, 1979 to respond both to the Motion to Dismiss and to the Order of the District Court dated October 29, 1979. Yet rather than showing cause by November 13, 1979, the date to which leave was requested, Petitioners then attempted to obtain yet *another* extension of time via a Motion of Plaintiffs for Leave to File Answers to Interrogatories and Proof of Production of Documents by November 15, 1979. It was only after that point that the District Court dismissed the action. A-11.

Two further points are omitted from the statement of the case presented by Petitioners. First, no documents or responses to interrogatories were received until after the District Court informed Appellants (through its ten day show cause Order attached as Exhibit A) that it would dismiss the case. The responses to the document requests and to the first set of interrogatories which Petitioners then filed were both untimely and wholly inadequate.[4]

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[4] In response to an extensive document request (the Defendants' First Request for Production and Inspection of Documents was six pages long and contained thirty-two separate requests for documents), Petitioners produced only nine documents, all but two of which were Home State Savings Association documents. Essentially Petitioners produced only those documents which they knew were already in

Second, Petitioners make yet another false statement at pp. 12-13 of the Petition For Writ of Certiorari:

> "*The last communication was a letter* written by counsel for Respondents *on May 31* and there was no further communication between counsel for Respondents and counsel for Petitioners regarding this matter until the motion to dismiss was filed on September 28, 1979." (Emphasis added.)

This statement is false. There was a June 1, 1979 telephone call from counsel for Respondents to counsel for Petitioners in which counsel for Petitioners once again promised counsel for Respondents that discovery responses would be forthcoming and that a letter was to be sent which would explain the repeated delays; see ¶ 8 of the affidavit of counsel attached as Exhibit B to this brief.

After these numerous unsuccessful attempts to get Petitioners to respond to the two pending discovery requests, on September 28, 1979, Respondents filed the Motion of

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Respondents' possession; these documents included correspondence and a copy of the public financial statement of Respondent Home State Savings Association. Of the thirty-two separate categories of documents requested in the document request (A. 40-43 in the Sixth Circuit appendix), Petitioners failed to produce documents called for by thirty-one of those requests. (A. 216, 209-210 in the Sixth Circuit appendix.)

The answers to the First Set of Interrogatories were ridiculous. In answer to interrogatories seeking to determine the steps the Plaintiffs took pursuant to the commitment letter at issue, the response was made that neither Plaintiff had direct personal knowledge of the steps taken, and that a lawyer in Burbank, Illinois would have that knowledge. When asked to identify each and every person whom the Plaintiffs would call as a witness, Plaintiffs listed only two persons, the named Plaintiff Charles Zander and "Robert C. Caruso, Address unknown." It is apparent that Petitioners were engaging in the "game of blindman's bluff" which this Court has repeatedly condemned. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). *Accord*: *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947).

Defendant Home State Savings Association to Dismiss Plaintiffs' Complaint. Petitioners failed to respond to that motion within the twenty days set by S.D. Ohio Rule 3.5.2.

By Petitioners' own admission, the attempted (but deficient) response to the Motion to Dismiss and to the two discovery requests was untimely. At p. 16 of the Petition for Writ of Certiorari, Petitioners state that they served the answers to interrogatories and the documents produced upon counsel for Respondents by mail on November 14, 1979. That service was over six months after the period of time called for by the Federal Rules of Civil Procedure, within which responses were due to the First Request for Production and Inspection of Documents and to the First Set of Interrogatories. It was also long past the twenty days within which Petitioners should have responded to the Motion of Defendant Home State Savings Association to Dismiss Plaintiff's Complaint, which was filed September 28, 1979. It was also past the ten days permitted by the Order filed October 29, 1979, which had given Petitioners ten days to show cause why the action should not be dismissed.

Finally, Petitioners misleadingly state at p. 14 of the Petition for Writ of Certiorari that the "District Court orally agreed to that extension," referring to their request for extension of time to show cause within ten days why the Motion to Dismiss should not be granted. That statement is false. What the District Court in fact stated is recorded in its January 9, 1980 Order, found at A-8:

> "Plaintiff was advised orally that *if a responsive pleading were filed* by the close of business on November 13, 1979, it would be accepted." (Emphasis added.)

A responsive pleading was not filed because Petitioners were simply moving for leave to file the interrogatory

answers and proof of production of documents by November 15, 1979. Petitioners were seeking only a further extension of time within which to file a proper response and within which to show cause. Petitioners would have this Court hold that a memorandum in support of a motion for an extension of time is "cause" within an order to show cause why an action should not be dismissed for failure to prosecute. The ludicruous nature of that proposition is self-evident.

ARGUMENT

The Dismissal For Failure to Prosecute Was Not An Abuse of Discretion and Was Not Contrary to the Decisions of the Sixth Circuit and of This Court

Under the applicable standard of review, *i.e.*, whether the District Court's dismissal of this action was an abuse of discretion,[5] the Sixth Circuit properly held that the

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[5] Petitioners recognize that the standard of review of a dismissal for failure to prosecute is abuse of discretion. Petition for Writ of Certiorari, pp. 20, 22. In addition, it is uniformly held that dismissals for failure to prosecute are reviewable under an abuse of discretion standard. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633 (1962) ("On this record we are unable to say that the District Court's dismissal of this action for failure to prosecute, as evidenced only party by the failure of petitioner's counsel to appear at a duly scheduled pretrial conference, amounted to an abuse of discretion."); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) ("The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."); *Carter* v. *City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980) ("The sole issue on appeal is whether the district court abused

District Court did not abuse its discretion in dismissing this action. Contrary to the claims of the Petition for Writ of Certiorari, the dismissal was consistent not only with this Court's opinion in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-643 (1976), but also with the Sixth Circuit case of *Carter* v. *City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980), both of which decisions are cited by Petitioners and claimed by them to be inconsistent with the Sixth Circuit opinion in the instant case.

It should also be noted that this case provides a flawed vehicle for review of the standards to be applied to dismissals for failure to prosecute, because the only Order before this Court is the *second* order of the District Court (found at A-7) in which it denied Petitioners' Motion to Vacate the original order of dismissal for failure to prosecute. Petitioners' Rule 60 (b) Motion to Vacate Order of November 21, 1979, was the subject of the appeal to the Sixth Circuit. The first Judgment and Order of dismissal (November 21, 1979, found at A-11) is not before this Court because an appeal from denial of a Rule 60 (b) motion does not bring up that underlying judgment for review. *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257, 263 n. 7 (1978), holding that "an appeal from denial of Rule 60 (b) relief does not bring up

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its discretion in dismissing the action."); *Schenck* v. *Bear Stearns & Co., Inc.*, 583 F.2d 58, 60 (2d Cir. 1978) ("Our scope of review is 'extremely narrow.' The matter is discretionary, and on appeal from such an order an appellate court will not reverse except for an abuse of discretion." (Citations omitted.)); *Marshall* v. *Sielaff*, 492 F.2d 917, 918 (3d Cir. 1974) (affirming a dismissal for lack of prosecution, stating: "Thus, the scope of appellate review of an order of dismissal is extremely narrow, confined solely to whether the trial court has abused its discretion."); and the cases cited at pp. 22-23 of the Petition for Writ of Certiorari.

the underlying judgment for review." In addition, *Browder* held that a ruling on a Rule 60 (b) motion is reviewable only for abuse of discretion, 434 U.S. at 263 n. 7. Hence if this Court should desire to select a case in which a dismissal for failure to prosecute is to be examined, this case is not the appropriate choice. The original judgment of dismissal is not before this Court. The order before this Court (A-7) is the District Court's denial of the Rule 60 (b) Motion to Vacate the judgment of dismissal.

It is undisputed that a District Court has power to dismiss an action for failure to prosecute. Fed. R. Civ. Pro. 41 (b); *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 629 (1962) ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted."); *National Hockey League, supra,* 427 U.S. at 642.

What are the standards set forth by *National Hockey League* and *Carter, supra,* the two decisions cited by Petitioners as setting forth the principles governing this case? This Court held in *National Hockey League, supra,* that the sanction of dismissal must be available to the District Court as a deterrent to the imitation of similar conduct, 427 U.S. at 642-643:

> "There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.

> *But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.* If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." (Second emphasis in original.)

The opinion of the Sixth Circuit in *Carter, supra,* simply held that the sanction of dismissal is appropriate only where there is "a clear record of delay or contumacious conduct by the plaintiff." 636 F.2d at 161. In the instant case, both the District Court (A-11) and the Sixth Circuit (A-6) found a pattern of delay. Moreover, the Sixth Circuit in *Carter* held that the District Court need only "permit plaintiff a short and reasonable period within which to comply with its Order to show cause; Petitioners failed to file any papers within that period of time.[6]

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[6] At pp. 20-22 of the Petition for Writ of Certiorari, Petitioners quote at length from *Reizakis* v. *Loy,* 490 F.2d 1132 (4th Cir. 1974). *Reizakis* is distinguishable from the case at bar. Five days before trial (and after discovery and a pretrial conference), plaintiff asked the court for a continuance so he could substitute trial counsel. The court denied the request for a continuance. When plaintiff was not prepared to try the case on the day set for trial, the court dismissed the case for lack of prosecution. The Fourth Circuit reversed only because "the facts did not depict a drawn-out history of deliberately proceeding in a dilatory fashion." 490 F.2d at 1135. The facts in the instant case show such a "history of deliberately proceeding in a dilatory fashion."

The heart of Petitioners' argument is this. Totally ignoring the pattern of delay (and in fact conceding it), Petitioners offer two excuses. Petition For Writ of Certiorari, pp. 23-24:

> "The delay on their part was attributable to the failing health and hospitalization of Petitioner Charles Zander. The balance of the delay was due to involvement of counsel of the Petitioners (A. 159-161)."

Neither of these excuses is sufficient, and in fact the first excuse is a falsehood.

It is literally beyond belief that Mr. Zander's alleged illness and counsel's "involvement" with other cases suddenly ended after the District Court's Order of October 29, 1979, which Order granted ten days within which Petitioners should show cause. Further, the facts in the record with respect to Mr. Zander's claimed hospitalization show that counsel for Petitioners informed counsel for Respondents that counsel had in his office, at the time the document request was first served, documents responsive to the request (¶ 8 of Affidavit of counsel attached to this brief as Exhibit B) and yet counsel for Petitioners repeatedly failed and refused to send these documents by mail to counsel for Respondents. The alleged hospitalization of Petitioner Zander was in no way involved in counsel's repeated refusal to provide these documents which counsel admitted were sitting in his office. Indeed, a letter from Petitioners' counsel dated April 23, 1979 stated that Mr. Zander "was in the hospital up until last week." (Exhibit E to the Motion to Dismiss). The letter continues by stating that Mr. Zander conferred with counsel on "Thursday, April 19th." Therefore, Petitioner Zander was out of the hospital and conferred with his counsel over six months before the October 29, 1979 Order to show cause,

and over seven months before Petitioners finally provided their insufficient discovery responses.

With respect to the second excuse, that the "balance of the delay was due to involvement of counsel of the Petitioners" in other cases, the authorities are uniform that an attorney's ignorance or carelessness, or an attorney's failure to timely file memoranda, is an insufficient justification for relief under Fed. R. Civ. Pro. 60 (b). *Cline* v. *Hoogland,* 518 F.2d 776, 778-779 (8th Cir. 1975); *Bershad* v. *McDonough,* 469 F.2d 1333, 1337 (7th Cir. 1972); *Whitlock* v. *Midwest Acceptance Corp.,* 76 F.R.D. 190, 191 (E.D. Mo. 1977); *Greene* v. *Pyatt,* 78 F.R.D. 362, 363 (E.D. N.Y. 1978); *Vega Matta* v. *Alvarez DeChoudens,* 440 F. Supp. 246, 249 (D. P.R. 1977), *aff'd, without opinion,* 577 F.2d 722 (1st Cir. 1978).

Under these circumstances, there was certainly no abuse of discretion in dismissing the action. Three further arguments made by Petitioners require a brief response.

Petitioners argue that lesser sanctions were appropriate. Petition for Writ of Certiorari, pp. 3, 26. "The district court need not, however, exhaust the lesser sanctions before dismissing a case under Rule 41 (b)." *Asociacion de Empleados del Instituto de Cultura Puertoriquena* v. *Morales,* 538 F.2d 915, 917 (1st Cir. 1976) (affirming dismissal with prejudice for failure to prosecute).

Petitioners' suggestion that a motion to compel discovery was a prerequisite to the District Court's dismissal of the action (Petition for Writ of Certiorari at pp. 1, 24-25, 26) is completely erroneous. Fed. R. of Civ. Pro. 37 (d) provides that a complete failure to respond to a discovery request enables the party serving the discovery request to move immediately for sanctions. *Black Panther Party* v. *Smith,* 661 F.2d 1243, 1257 (D.C. Cir. 1981):

> "In situations where the organization completely fails to respond to interrogatories, a motion to compel discovery under Rule 37 (a) is not necessary. Instead, the party that served the interrogatories may immediately move for sanctions under Rule 37 (d)."

At p. 1 of the Petition for Writ of Certiorari, Petitioners falsely state: "No warning was ever given to Petitioners by the District Court." Again, at p. 28 of the Petition, Petitioners falsely claim that in this case there "were no warnings by the Court" before the action was dismissed. Nothing could be clearer than the language of the Order to show cause that is attached as Exhibit A to this brief.

However, even if that Order were not present in his case, this Court has held that the District Courts have the power to dismiss with prejudice a plaintiff's action because of his failure to prosecute. *Link* v. *Wabash Railroad Co., supra,* 370 U.S. at 630-631. "Nor does the absence of notice as to the possibility of dismissal or the failure to hold an evidentiary hearing necessarily render such a dismissal void." 370 U.S. at 632. "Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting." 370 U.S. at 633. In the instant case, the District Court did not act sua sponte, but rather acted only after Petitioners repeatedly failed (a) even to respond to discovery requests; (b) to show cause (in response to the Order) why the action should not be dismissed; and (c) to respond to the Motion to Dismiss for failure to prosecute.

CONCLUSION

The Sixth Circuit properly held that the District Court did not abuse its discretion in dismissing this action for failure to prosecute.

The instant case is unremarkable and consistent with previous decisions of the Sixth Circuit and this Court. Moreover, because the only Judgment on review was the District Court's second judgment denying Petitioner's Rule 60 (b) motion to set aside the first judgment of dismissal, this case is procedurally flawed for the purposes of a review of the standards for dismissal under Fed. R. Civ. Pro. 41 (b). Therefore, the Petition should be denied.

Respectfully submitted,

Charles J. Faruki

Counsel for Respondents

SMITH & SCHNACKE
A Legal Professional Association

P.O. Box 1817
2000 Courthouse Plaza N.E.
Dayton, Ohio 45401
(513) 226-6734

STATE OF OHIO)
) SS:
COUNTY OF MONTGOMERY)

Proof of Service

The undersigned, having been duly put upon oath, deposes and says that three copies of Respondents' Brief In Opposition to Petition for a Writ of Certiorari to The Court of Appeals for The Sixth Circuit were served upon George C. Pontikes, Counsel for Petitioners, Foss, Schuman & Drake, 11 South La Salle Street, 6th Floor, Chicago, Illinois 60603 by First Class Mail this 25th day of January, 1982.

Charles J. Faruki

Charles J. Faruki

Subscribed and Sworn to before me this 25th day of January, 1982.

Jean M. Steigerwald

Notary Public

JEAN M. STEIGERWALD, Notary Public
In and for The State of Ohio
My Commission Expires March 25, 1985

APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-79-105

ZAN-CAR ENTERPRISES, INC., ET AL.,

Plaintiffs,

v.

HOME STATE SAVINGS ASSOCIATION, ET AL.,

Defendants.

ORDER

(Filed October 29, 1979)

This matter is before the Court on the motion of defendant Home State Savings Association to dismiss plaintiffs' complaint pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure. More specifically, defendant claims that plaintiffs have failed to prosecute this action by refusing to comply with defendants' discovery requests.

Defendants' motion to dismiss was filed on September 28, 1979. To date plaintiff Zan-Car Enterprises, Inc. has declined to respond to such motion. Rule 3.5.2 of the Rules of the United States District Court for the Southern District of Ohio provides in part as follows:

> . . . [f]ailure to file a memorandum contra may be cause for the Court to grant the motion as filed.

Accordingly, plaintiff is directed to show cause within ten days of the date of this Order why the motion to dismiss of Home State Savings Association should not be granted as filed.

It is so ORDERED.

/s/ CARL B. RUBIN,
Chief Judge
United States District Court

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)

CIVIL ACTION No. C-1-79-105
(J. Rubin)

ZAN-CAR ENTERPRISES, INC., et al.,

Plaintiffs,

v.

HOME STATE SAVINGS ASSOCIATION, et al.,

Defendants.

AFFIDAVIT OF CHARLES J. FARUKI

STATE OF OHIO)
) SS:
COUNTY OF MONTGOMERY)

Charles J. Faruki, being duly cautioned and sworn, deposes and says:

1. I am an attorney at law licensed to practice law in Ohio and in this Court. I am the trial attorney for Defendant Home State Savings Association in the above-captioned action. I make this affidavit on personal knowledge and in support of the Motion Of Defendant Home State Savings Association To Dismiss Plaintiffs' Complaint.

2. This is an action on a very old claim. Plaintiffs commenced this action March 25, 1977 in the United States District Court for the Northern District of Illinois (Chicago). I represented Defendants in that court. On October 28, 1977 that court granted Defendants' Motion to Dismiss based upon lack of personal jurisdiction. I obtained no discovery from Plaintiffs while the action was pending in Chicago. *Plaintiffs then waited over one year to refile the action in this Court.* The dismissal of the action in Chicago was October, 1977; almost sixteen months later Plaintiffs refiled the action in this Court.

3. This action was filed in the United States District Court for the Southern District of Ohio on February 16, 1979. Defendants answered on March 5, 1979, and along with the answer Defendants served the First Set of Interrogatories of Defendants to Plaintiffs. That First Set of Interrogatories is attached to the instant motion as Exhibit A, and was served March 5, 1979. On March 20, 1979 Defendants' First Request for Production and Inspection of Documents (Exhibit B) was served. *Defendants have not received a single response to either one of these discovery requests, despite repeated efforts to obtain answers to the interrogatories and production of documents, and despite repeated assurances by Plaintiffs that both documents and answers (not objections) to interrogatories would be provided.*

4. The extrajudicial means that have been attempted to resolve the problem of Plaintiffs ignoring the two discovery requests are as follows. Both discovery requests (the First Set of Interrogatories that is Exhibit A and the First Request for Production and Inspection of Documents that is Exhibit B) have now been pending without any response for over six months. Attached to this Motion

as Exhibits D through I are letters from me to Mr. Pontikes and Mr. Glazer, the Chicago and Cincinnati counsel for Plaintiffs. These letters are dated April 23, April 25, April 26, May 10, May 25, and May 31, 1979, and contain the full history of Defendants' attempts to obtain compliance with the pending discovery requests.

5. As is shown by the April 25, April 26, and May 10, 1979 letters (Exhibits D through I to this Motion), Plaintiffs twice requested extensions of time within which to produce documents and to answer the interrogatories. Defendants were informed that Mr. Pontikes and his client were preparing answers to the interrogatories, and that they would copy all the documents in their possession, and send them to me. I have not received a single answer or document.

6. Mr. Pontikes informed me that his client Charles Zander was in the hospital, which made answering the interrogatories more difficult. I agreed to an additional extension of time; see the May 31, 1979 letter, attached to the Motion as Exhibit I. However, Mr. Glazer and Mr. Pontikes agreed that Mr. Zander's hospitalization would not preclude a partial or limited production of documents, since many of the documents called for by the First Request for Production of Documents were stated by Mr. Pontikes to be in his possession.

7. Mr. Glazer informed my office on May 30, 1979 that a letter had been written to me from Mr. Pontikes concerning the Plaintiffs' delay in producing documents and in answering our interrogatories. I have never received such a letter.

8. Finally, I have had numerous telephone conversations with Messrs. Pontikes and Glazer to attempt to

resolve these problems. These telephone calls include one from me to Mr. Pontikes on April 6, 1979, in which Mr. Pontikes stated that he needed a couple more weeks to answer the interrogatories, and that he will "copy everything he has" with respect to the document production and send it to me. We agreed during that telephone call that he would mail both the answers to the interrogatories and the documents called for by the First Request for Production by April 23, 1979. Another telephone call was the May 30, 1979 telephone message from Mr. Glazer, which message was that I should have received a letter from Mr. Pontikes concerning the delay because of his client's hospitalization. Another telephone call was my June 1, 1979 telephone call to Mr. Glazer. Mr. Glazer stated that he talked to Mr. Pontikes on May 23, 1979, and that Mr. Pontikes had said that Mr. Zander was in the hospital. Mr. Glazer again told me that I was to receive a letter from Mr. Pontikes concerning the delay. I told him that I wanted the limited production of documents as soon as possible, and he agreed that this was reasonable.

9. Home State Savings Association is a Cincinnati-based Ohio building and loan association which is regularly audited. Warner National Corporation is a respected, publicly-held company. Both Defendants of course have to reveal litigation such as the instant case to their auditors, and disclose it on their public documents and regulatory filings and on their audited financial statements. In the instant case Plaintiffs waited nearly sixteen months after the United States District Court in Chicago dismissed this action in October, 1977 before refiling the action in this Court. Plaintiffs have totally refused to cooperate in discovery, in even a limited fashion. The Preliminary Pretrial Order filed June 4, 1979 (attached to this Motion

as Exhibit J) sets a March 1, 1980 discovery cutoff. There is no way that Defendants could complete discovery by that date if the very first, basic step of document production and interrogatory responses is not even completed some six months after this action was filed in this Court.

10. Further affiant saith not.

/s/ CHARLES J. FARUKI

Sworn to and subscribed before me this 28th day of September, 1979.

Jean M. Steigerwald
Notary Public

EXHIBIT D TO MOTION TO DISMISS

SMITH & SCHNACKE

April 25, 1979

George C. Pontikes, Esquire
Foss, Schuman & Drake
11 South LaSalle Street
Chicago, Illinois 60603

Re: *Zan-Car Enterprises, Inc., et al.* v. *Home State Savings Association, et al.*

Dear Mr. Pontikes:

I am writing to inquire about the status of your responses to the request for production of documents and to the set of interrogatories which I sent you. On April 6 I called you about these discovery requests. You said that you needed a couple more weeks for the answers to the interrogatories, and that you would copy all the documents you and your client have and send them to me. I agreed to an extension of time; we agreed that you would mail to me by April 23, 1979, both the answers to the interrogatories and the documents called for by the request for production of documents.

The First Set of Interrogatories of Defendants to Plaintiffs was served March 5, 1979, and called for answers on or before April 9, 1979. The Defendants' First Request for Production and Inspection of Documents was served March 20, 1979, and called for production of documents on or before April 23, 1979. Of course I would not give you a hard time with respect to an extension of time, so long as the extension does not become open ended.

In addition, I understand that an attorney in Reno, Nevada, who formerly represented the corporate plaintiff

will have additional documents responsive to the request, and that you personally wish to deal with him to make a full response to the request for production of documents.

I would like to have production of whatever documents you now have, without delaying the entire document production until you obtain further documents from the attorney in Nevada.

I will be out of town trying a case in Virginia until May 7. If you could provide to me the documents you presently have and the interrogatory answers by then, I would very much appreciate it.

Very truly yours,
Charles J. Faruki

CJF/dc
cc: Richard H. Glazer, Esquire
bcc: Gehl P. Babinec, Esquire

EXHIBIT E TO MOTION TO DISMISS

FOSS, SCHUMAN & DRAKE

April 23, 1979

Smith and Schnacke
Attorneys at Law
2000 Courthouse Plaza N.E.
Post Office Box 1817
Dayton, Ohio 45401

Attention: Charles J. Faruki
Re: Zan-Car Enterprises, Inc. et al v. Home State Savings Association et al.

Dear Mr. Faruki:

I am writing you this letter in order to request an additional two weeks in which to file our answer to interrogatories and to produce the documents requested in your notice to produce.

Unfortunately, Charles Zander, one of the plaintiffs and the principal in Zan-Car Enterprises, Inc. was in the hospital up until last week. As a result, he and I were unable to confer until last Thursday morning, April 19th.

I should be able to supply you with answers and the documents by May 7, 1979.

If you have no objection, please write and let me know.

Yours truly,
FOSS, SCHUMAN & DRAKE
/s/ GEORGE C. PONTIKES

GCP:jc

EXHIBIT F TO MOTION TO DISMISS

SMITH & SCHNACKE

April 26, 1979

George C. Pontikes, Esquire
Foss, Schuman & Drake
11 South LaSalle Street
Chicago, Illinois 60603

Re: *Zan-Car Enterprises, Inc., et al.* v. *Home State Savings Association, et al.*

Dear Mr. Pontikes:

I have just received your letter of April 23, 1979, requesting another extension of time in which to file your answers to the Defendants' interrogatories, and in which to produce the documents which I have requested. I agree to your request for an extension of time to May 7, 1979.

My letter to you of April 25, 1979 was sent before I received your letter of April 23. Therefore this letter supersedes it.

Very truly yours,
CHARLES J. FARUKI

CJF/dc
bcc: Gehl P. Babinec, Esquire

EXHIBIT G TO MOTION TO DISMISS

SMITH & SCHNACKE

May 10, 1979

George C. Pontikes, Esquire
Foss, Schuman & Drake
11 South LaSalle Street
Chicago, Illinois 60603

Re: *Zan-Car Enterprises, Inc., et al.* v. *Home State Savings Association, et al.*

Dear Mr. Pontikes:

I am writing you once again concerning your answers to the Defendants' first set of interrogatories which were due April 9, 1979, and your response to our first request for production of documents, which was due April 23, 1979. I have received neither interrogatory answers nor the documents called for by our Rule 34 request, and I have not received any communication from you concerning another extension of time.

To date, no discovery has been conducted in this case. This is the third time I have had to write you about this subject, and you have twice requested extensions of time within which to produce the documents and to answer the interrogatories. I agreed to both those extensions of time, and both extensions have gone by without any word from you. See my letters to you of April 25 and April 26, 1979.

I have been relying on your statements to me in our telephone conversation of April 6, 1979, that you and your client were preparing answers to the interrogatories, and that you would copy all the documents you and your client have and send them to me. Since your are providing

answers rather than objections to these discovery requests, I am being lenient about the extensions of time.

I will be out of town the week of May 14, and will be back in the office May 22, 1979. Please provide to me by then all the documents you have that are called for by the Defendants' First Request For Production And Inspection Of Documents, and your answers to the First Set Of Interrogatories Of Defendants To Plaintiffs. You have not requested this additional extension of time, but I am assuming that there are good reasons for your lack of response to date.

Very truly yours,

CHARLES J. FARUKI

CJF/dc
cc: Richard H. Glazer, Esquire
bcc: Gehl P. Babinec, Esquire

EXHIBIT H TO MOTION TO DISMISS

SMITH & SCHNACKE

May 25, 1979

George C. Pontikes, Esquire
Foss, Schuman & Drake
11 South LaSalle Street
Chicago, Illinois 60603

Re: *Zan-Car Enterprises, Inc., et al.* v. *Home State Savings Association, et al.*

Dear Mr. Pontikes:

Since I have not heard from you in response to my letters to you of April 25, April 26, and May 10, 1979, and since your answers to the First Set of Interrogatories of Defendants to Plaintiffs are long overdue, and the documents called for by the Defendants' First Request for Production and Inspection of Documents have not been sent to me, I have no choice but to file a Rule 37 motion to compel discovery. I will file this motion at the end of next week, since I will be out of town the first three days of next week in depositions.

As you recall, you told me on April 6, 1979 that you would copy all the documents you and your client have and send them to me, along with answers to the interrogatories. I agreed to two extensions of time which you requested, and I have not heard from you since the last one.

Very truly yours,

CHARLES J. FARUKI

CJF/dc
cc: Richard H. Glazer, Esquire
bcc: Gehl P. Babinec, Esquire

EXHIBIT I TO MOTION TO DISMISS

SMITH & SCHNACKE

May 31, 1979

Richard H. Glazer, Esquire
10475 Montgomery Road
Suite IA
Cincinnati, Ohio 45242

Re: *Zan-Car Enterprises, Inc., et al.* v. *Home State Savings Association, et al.*

Dear Mr. Glazer:

I have a May 30 telephone message from you that I should have received a letter from Mr. Pontikes concerning the Plaintiffs' delay in producing documents and in answering interrogatories, because Mr. Zander is in the hospital. I did not know that he is currently in the hospital.

However, this should not preclude a partial or limited production of documents, since I understood from Mr. Pontikes that some of these documents were already in his possession. I will await a limited production of documents, and Mr. Pontikes' clarification of Mr. Zander's situation.

Thank you for your attention to this problem.

Very truly yours,

CHARLES J. FARUKI

CJF/dc
cc: George C. Pontikes, Esquire
bcc: Gehl P. Babinec, Esquire